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January 13, 2010

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street S.W.
Washington, DC 20554

Re: *In re Review of the Commission's Program Access Rules*, MB Docket No. 07-198
Ex Parte Filing

Dear Ms. Dortch,

On January 12, 2010, representatives of Comcast Corporation ("Comcast") met separately with Sherrese Smith, Legal Advisor for Media, Consumer and Enforcement Issues for Chairman Julius Genachowski; Joshua Cinelli, Media Advisor to Commissioner Michael J. Copps; Millie Kerr, Confidential Assistant and Staff Attorney to Commissioner Meredith Attwell Baker; Rosemary Harold, Legal Advisor for Media Issues to Commissioner Robert M. McDowell; Austin Schlick, General Counsel of the Commission; and the following Commission staff: Nancy Murphy, David Konczal, and Diana Sokolow of the Media Bureau, and Stuart Benjamin of the Office of Strategic Planning. Comcast was represented in these meetings by James R. Coltharp, Chief Policy Advisor, FCC & Regulatory for Comcast Corporation, and James Casserly and the undersigned of Willkie Farr & Gallagher LLP. In addition, on January 13, 2010, Mr. Coltharp of Comcast and Jessica Feinberg and the undersigned of Willkie Farr & Gallagher LLP met with Rick Kaplan, Acting Chief of Staff for Commissioner Clyburn, and Millie Kerr, Confidential Assistant and Staff Attorney to Commissioner Meredith Attwell Baker; Ms. Kathryn Zachem, Vice President of Regulatory and State Legislative Affairs for Comcast Corporation, also conducted a call with Ms. Kerr. We distributed and discussed the handouts attached to this letter (attachments 1 & 2). In addition, we made the following points, though we did not make each point in each meeting.

I. THE COMMISSION SHOULD NOT EXTEND THE PROGRAM ACCESS RULES TO TERRESTRIALLY-DELIVERED PROGRAMMING.

Comcast believes the basic thrust of the current initiative is fundamentally in error. As a legal matter, extending Section 628(b) of the Communications Act and other program access requirements to terrestrially-delivered programming is inconsistent with the text, structure, history, and purpose of the statute. As a policy matter, allowing video competitors to distinguish their services by offering exclusive programming is a benefit to consumers, while long-standing predictions of a "terrestrial migration" have been proven false. As a factual matter, multichannel video programming distributor

("MVPD") competition has become well established and there is no evidence in the record that competing MVPDs have been in any way hindered from "providing satellite cable programming . . . to subscribers."

As Comcast and others have detailed, Congress intentionally exempted terrestrially-delivered programming from the program access provisions in Section 628 of the Communications Act.[1] The Commission repeatedly has confirmed this fact.[2] Accordingly, the Commission's reported plan to reverse course completely and extend the program access rules to terrestrially-delivered programming directly conflicts with the express language of the statute, the legislative history, and the Commission's own precedent.[3]

As a policy matter, allowing MVPDs to distinguish their services by offering exclusive programming promotes investment in programming and benefits consumers.[4] Moreover, despite certain parties claims to the contrary, the long-standing predictions (over a decade's worth) of a "terrestrial migration" in order to evade the program access rules have proven false.[5] The Commission

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[1] *See, e.g.*, Comcast Comments, MB Docket No. 07-198, at 7 (Jan. 4, 2008) ("Congress made a deliberate choice to exempt terrestrially-delivered cable-affiliated programming from the program access rules."); Cablevision Comments, MB Docket No. 07-198, at 17-18 (Jan. 4, 2008); NCTA Comments, MB Docket No. 07-198, at 12-13 (Jan. 4, 2008); Comcast Reply Comments, MB Docket No. 07-198, at 9-11 (Feb. 12, 2008); Cablevision Reply Comments, MB Docket No. 07-198, at 16-17 (Feb. 12, 2008). More recently, Cablevision has explained why Congress chose to specifically limit the prohibition in Section 628(c)(2) to only "satellite cable programming," and why the Commission cannot overturn Congress's determination that only satellite cable programming should be subject to the program access rules. *See* Ex Parte Letter from Mr. Howard Symons, Counsel to Cablevision, to Ms. Marlene Dortch, Secretary, FCC, MB Docket No. 07-198, at 1-3 (Jan. 8, 2010).

[2] *See DIRECTV v. Comcast*, 13 FCC Rcd. 21,822 ¶ 32 (Cable Servs. Bureau 1998) ("*DirecTV Bureau Order*") ("In enacting Section 628, Congress determined that while cable operators generally must make available to competing MVPDs vertically-integrated programming that is satellite-delivered, they do not have a similar obligation with respect to programming that is terrestrially-delivered."); *EchoStar v. Comcast*, 14 FCC Rcd. 2089 ¶ 28 (Cable Servs. Bureau 1999) ("*EchoStar Order*") (same); *DIRECTV v. Comcast*, 15 FCC Rcd. 22,802 ¶ 12 (2000) ("*DirecTV FCC Order*") (affirming the *DirecTV Bureau Order* and *EchoStar Order*); *cf. EchoStar Communications Corp. v. FCC*, 292 F.3d 749, 751-52 (D.C. Cir. 2002) ("The Cable Services Bureau denied EchoStar's complaint in its entirety. The Bureau held first that EchoStar's claims under the regulations -- based upon the Comcast affiliates' refusal to sell it Sports-Net, and upon Comcast's unduly influencing its affiliates -- failed because SportsNet, being terrestrially distributed, is not 'satellite cable programming.'").

[3] *See* 5 U.S.C. § 706.

[4] *See, e.g.*, Comcast Comments, MB Docket No. 07-29, at 16-17 (Apr. 2, 2007) ("Allowing the producer of a product or service to limit the channels through which it will be distributed, or allowing a distributor to distribute or refuse to distribute a given product or service, can foster investment and innovation and increased competition based on product differentiation -- so-called 'interbrand' competition."); Cablevision Comments, MB Docket No. 07-29, at 29 (Apr. 2, 2007) ("Allowing the ban to expire will intensify competition in the video distribution market, and provide consumers with more choices and a greater diversity of content offerings and options.").

[5] Unsupported and vague allegations of a terrestrial migration to evade the program access rules are made year after year. *See, e.g.*, Comcast Reply Comments, MB Docket No. 06-189, at 27 (Dec. 29, 2006) (describing a history of comments making such allegations in the video competition proceedings); Comcast Reply Comments, MB Docket No. 05-255, at 25-26 (Oct. 11, 2005) (same). In the rare circumstances where parties have filed complaints alleging that networks were shifted to terrestrial delivery to evade the program access rules however, the Commission has consistently rejected the charges. *See, e.g., RCN Telecomm. Servs. of N.Y., Inc. v. Cablevision Sys. Corp.*, 14 FCC Rcd. 17,093 (1999), *aff'd*,

has yet to find that a single instance where a programming network was migrated to terrestrial delivery in order to evade the program access rules.

Finally, as a factual matter, competing MVPDs are well established and there is no evidence in the record that they are being in any way hindered from "providing satellite cable programming . . . to subscribers." As an initial matter, the evidence in the record on this issue that certain parties point to in support of their claims that they are being hindered are surveys and regression analyses submitted in two pending complaint proceedings that have been thoroughly rebutted by the defendants and on which no factual determination about the relevance or credibility of the evidence has been made. More importantly, recent data released by SNL Kagan and Media Business Corp. ("MBC") demonstrates that competing MVPDs in every market are successfully attracting customers away from cable operators. For example,

- In Philadelphia where DirecTV and Dish Network (formerly EchoStar) do not have access to Comcast SportsNet-Philadelphia ("CSN-Philadelphia"), since 2002, direct broadcast satellite ("DBS") providers' (DirecTV's and Dish Network's) combined penetration in Philadelphia has grown from 3.9%, *see 2002 Exclusivity Ban Extension Order*, 17 FCC Rcd. 12,124 ¶ 33 n.107 (2002), to 14.4% as of September 2009 (SNL Kagan/Media Business). Of particular note, compared to telco competitors (such as Verizon, AT&T, and RCN) all of which have access to CSN-Philadelphia, DBS penetration is higher; according to SNL Kagan and MBC's data, telco penetration in the Philadelphia DMA is 9.74%.

- DBS penetration in Philadelphia is higher than or comparable to that in many other markets where DBS operators have access to all RSNs: as of September 2009, DBS penetration in New York was 12.9%, Boston was 14.64%, Tampa-St. Pete was 15.38%, Baltimore was 16.49%, Hartford & New Haven was 15.6%, Norfolk-Portsmouth was 15.59%, Providence-New Bedford was 10.25%, and Springfield-Holyoke was 14.58%.

- In New York, where Verizon and AT&T do not have access to HD versions of the Madison Square Garden Network, according to SNL Kagan and MBC's data, telco providers have been able to attract 11.48% of the subscribers in the DMA even though they do not offer service to all the households in the DMA. Combined with the DBS penetration of 12.9%, competing providers serve 24.38% of all the households in the DMA.[6]

The data of the competitiveness of the MVPD marketplace seriously undermines any claim that the withholding of terrestrially-delivered programming generally, let alone significantly, hinders competitors' ability to deliver programming to consumers. To find to the contrary would be arbitrary or capricious.[7]

Memorandum Opinion & Order, 16 FCC Rcd. 12,048 (2001); *DirecTV Bureau Order* ¶ 29; *EchoStar Order* ¶ 25; *DirecTV FCC Order* ¶ 14. There is no evidence of any such migration to evade the program access rules.

[6] *See* Attachment 2.

[7] *See* 5 U.S.C. § 706.

II. THE COMMISSION CANNOT IGNORE THE STATUTORY REQUIREMENTS THAT ONLY CONDUCT THAT IS "UNFAIR" OR "DECEPTIVE" AND "HINDERS SIGNIFICANTLY" OR "PREVENTS" THE DISTRIBUTION OF PROGRAMMING VIOLATES SECTION 628(b).

Even were the Commission to reinterpret Section 628(b) to reach terrestrial programming, the Commission must not ignore or make meaningless the express statutory requirements. Section 628(b) states, in relevant part: "It shall be unlawful for a cable operator . . . to engage in *unfair methods of competition or unfair or deceptive acts or practices*, the purpose or effect of which is *to hinder significantly or to prevent* any [MVPD] from providing satellite cable programming."[8] As the Commission has explained, to establish a violation of Section 628(b), a complainant alleging that programming was withheld must show that: (1) "the defendant has engaged in unfair methods of competition or unfair or deceptive acts or practices"; *and* (2) "the unfair acts or practices, if found, had the purpose or effect of hindering significantly or preventing a MVPD from providing satellite cable programming."[9] Thus, a complainant must first show that a defendant's conduct is "unfair" or "deceptive."

Certain parties now urge the Commission to find that withholding of terrestrially-delivered programming is per se "unfair" and simply to analyze whether a complainant has been hindered significantly or prevented from delivering programming. The Commission, however, is constrained by the express language of Section 628.[10] Adopting a finding that refusing to license terrestrial programming is *per se* unfair, or even *presumed* unfair, without requiring a complainant to demonstrate that the practice *is* unfair would read the "unfair or deceptive" test right out of the statute. As the Commission explained to the D.C. Circuit in *EchoStar Communications Corp. v. FCC*,[11]

> It is an established canon of statutory construction that courts must give meaning and effect to each term of a statute. . . . In its opening brief EchoStar further contends that Section 628(b) "applies so long as a competing distributor is hampered in the provision of 'satellite cable programming,' no matter if the programming withheld from that competitor qualifies itself as 'satellite cable programming.'" To accept EchoStar's interpretation, would improperly read the "unfair or deceptive" test right out of the statute. This Court should decline that invitation.[12]

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8 47 U.S.C. § 548(b) (emphases added); *see* 47 C.F.R. § 76.1001.

9 *DirecTV Bureau Order* ¶ 32; *EchoStar Order* ¶ 28; *see In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report & Order, 8 FCC Rcd. 3359 ¶¶ 36-41 (1993).

10 *See Alvin Lou Media, Inc. v. FCC*, 571 F.3d 1, 8 (D.C. Cir. 2009) ("[W]here a statute 'has directly spoken to the precise question at issue,' the court and the agency 'must give effect to the unambiguously expressed intent of Congress.'") (quoting *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 842-43 (1984)).

11 292 F.3d 749.

12 Brief of Respondent at 28-29, *EchoStar Communications Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002) (No 01-1032) ("*FCC D.C. Circuit Brief*"), *available at* http://www.fcc.gov/ogc/briefs/01-1032_120601.pdf (attached as Attachment 3).

The Bureau itself determined, and the Commission affirmed and highlighted to the D.C. Circuit, Section 628(b) "cannot . . . be converted into a tool that, on a *per se* basis, precludes cable operators from exercising competitive choices that Congress deemed legitimate."[13]

A finding that a refusal to license terrestrially-delivered programming is per se "unfair" not only would directly conflict with the statutory language, but also is likely precluded by collateral estoppel. Specifically, the issue of whether refusing to license terrestrially-delivered programming is per se "unfair" was "actually and necessarily decided"[14] when the Commission successfully defended its finding that Comcast's refusal to license CSN-Philadelphia to EchoStar was not an "unfair" practice in violation of Section 628(b).[15] The court expressly noted that "the Commission confirms that its determination that Comcast did not engage in unfair methods of competition or unfair or deceptive acts or practices involved a 'factual inquiry.'"[16] For the Commission to now say that *all* refusals to license terrestrially-delivered programming are per se "unfair" directly conflicts with the Commission's prior position in the very first argument it made to the D.C. Circuit, which the D.C. Circuit affirmed, that "THE COMMISSION CORRECTLY FOUND THAT COMCAST'S ACTIONS DID NOT CONSTITUTE UNFAIR OR DECEPTIVE ACTS."[17]

In one meeting, a question arose as to whether *EchoStar Communications Corp.* and the Bureau and Commission orders leading up to that case decided (1) that the terrestrial distribution of CSN-Philadelphia or the alleged migration of CSN-Philadelphia from satellite to terrestrial was not "unfair," *or* (2) that the refusal to license or withholding of CSN-Philadelphia from EchoStar was not "unfair." Comcast representatives explained that the issue decided was that the refusal to license CSN-Philadelphia was not an "unfair" practice because that is the only conduct that could theoretically violate Section 628(b) given that it is neither unlawful to distribute programming terrestrially nor to migrate programming from satellite to terrestrial delivery. The pleadings and decisions all the way from the Bureau to the D.C. Circuit confirm that the issue raised and decided was that the refusal to license CSN-Philadelphia was not "unfair."

> **DirecTV Complaint:** "DIRECTV asks that the Commission find that Defendants have violated Sections 628(b) and (c) of the Communications Act and 47 C.F.R. § 76.1002(b)

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13 *EchoStar Order* ¶ 29 (emphasis in original); *DirecTV Order* ¶ 33 (emphasis in original); *see FCC D.C. Circuit Brief* at 13.

14 *NextWave Pers. Communications, Inc. v. FCC*, 254 F.3d 130, 147 (D.C. Cir. 2001) ("Under [collateral estoppel], a final judgment on the merits in a prior suit precludes subsequent relitigation of issues actually litigated and determined in the prior suit, regardless of whether the subsequent suit is based on the same cause of action.").

15 *EchoStar Communications Corp.*, 292 F.3d at 751 ("Because we conclude that the Commission's order is reasonable and supported by substantial evidence, we deny review.").

16 *Id.* at 755.

17 *FCC D.C. Circuit Brief* at 16 (capitalization in original). In our meeting with Mr. Schlick et al., we distributed a copy of the brief the Commission filed with the D.C. Circuit, emphasizing in particular the principal point that Commission made in its brief was that Comcast had not violated Section 628(b). *See* Attachment 3.

through their express refusal to negotiate with DIRECTV regarding the carriage of Comcast SportsNet."[18]

EchoStar Complaint: "Comcast's unwillingness to initiate negotiations with EchoStar to carry its programming in the Greater Philadelphia area, where Comcast's regional sports programming is being carried by cable operators competing with EchoStar, constitutes an unfair practice within the meaning of 47 U.S.C. § 548(b)."[19]

***DirecTV Bureau Order*:** "DIRECTV characterized Defendants' outright refusal to sell as an 'unfair practice' as contemplated in Section 628(b)."[20] "Here, we do not believe that the record supports a conclusion that Comcast has engaged in unfair or deceptive acts in creating, packaging and *distributing* Comcast SportsNet."[21]

***EchoStar Order*:** "EchoStar asserts that Defendants' unfair denial of SportsNet violates Section 628(b) because it hinders the provision of EchoStar's satellite delivered service. We are not persuaded that the facts alleged are sufficient to constitute a Section 628(b) violation."[22]

DirecTV Application for Review: "Comcast's diversion of satellite-delivered programming to terrestrial delivery facilities and its concomitant refusal to sell that programming to DIRECTV or other DBS providers as a class is *precisely* the type of anticompetitive behavior Congress intended the Commission to address under Section 628(b)."[23]

EchoStar Application for Review: "[T]he Bureau effectively ignored EchoStar's specific statutory argument, based on the language of 628(b), that a refusal to sell terrestrial programming can be prohibited under 628(b) if it meets the elements of that section, *i.e.*, if it is unfair . . . ."[24]

***DirecTV Commission Order*:** "Complainants also maintain that the Bureau erred in not considering Comcast's actions to be an unfair act under Section 628(b). DIRECTV argues that moving programming to terrestrial delivery and refusing to sell to DBS providers is precisely the type of anti-competitive behavior Congress intended the Commission address under Section

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[18] *In re DirecTV, Inc. v. Comcast Corp.*, Program Access Complaint, CSR 5122-P, at 20 (Sept. 23 1997).

[19] *See In re EchoStar Communications Corp. v. Comcast Corp.*, Program Access Complaint, CSR 5244-P, at 14 (May 19, 1998) ("Comcast's unwillingness to negotiate with EchoStar to carry Comcast's regional sports programming . . . constitutes an unfair practice under the Communications Act and the Commission's Rules.").

[20] *DirecTV Bureau Order* ¶ 11.

[21] *Id.* ¶ 32 (emphasis added).

[22] *EchoStar Order* ¶¶ 27-28.

[23] *See In re DirecTV, Inc. v. Comcast Corp.*, Application for Review, CSR 5122-P, at 20 (Nov. 25, 1998) (emphasis in original).

[24] *See In re EchoStar Communications Corp. v. Comcast Corp.*, Application for Review, CSR 5244-P, at 17 (Feb. 25, 1999).

> 628(b). . . . However, we agree with the Bureau that the facts are not sufficient to constitute such a violation here."[25]
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> **EchoStar D.C. Circuit Brief:** The first issue in its "Statement of Issues Presented for Review" states, in relevant part: "Whether the FCC's finding that Comcast and its affiliates did not engage in an 'unfair method of competition or unfair or deceptive act or practice' by refusing to provide its Philadelphia sports programming to EchoStar violated the Administrative Procedure Act."[26]
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> ***EchoStar Communications Corp. v. FCC*:** "After failing to persuade Comcast to sell it the right to carry SportsNet, EchoStar filed a program access complaint with the Commission pursuant to 47 U.S.C. § 548. . . . The Bureau held first that EchoStar's claims under the regulations -- based upon the Comcast affiliates' refusal to sell it SportsNet, and upon Comcast's unduly influencing its affiliates -- failed because SportsNet, being terretrially distributed, is not 'satellite cable programming.' Next the Bureau -- assuming, as EchoStar had argued in its complaint, that the Commission could prohibit an attempt to evade the regulations -- concluded that Comcast had not switched SportsNet from satellite to terrestrial delivery with a purpose of evasion. . . . Having found no evasion, the Bureau held that Comcast had not engaged in any unfair method of competition or unfair practice under § 548(b)."[27]

In light of this history, there can be little question that the issue of whether the withholding of CSN-Philadelphia was an "unfair" practice under Section 628 was asserted, litigated, and decided.

We emphasized that a determination of whether a particular practice is "unfair" or "deceptive" is very fact-specific and likely will depend on the practice in question. Notably, in *RCN v. Cablevision*, after the Cable Services Bureau found that Cablevision's refusal to license terrestrial programming to RCN was not an "unfair" practice,[28] RCN filed a motion to consolidate its application for review with that of DirecTV's and EchoStar's. The Commission denied RCN's motion because, "[a]lthough the [CSN-Philadelphia] case and the RCN case facially involve the same underlying issue, we believe that the *particular facts of each proceeding are sufficiently unique as to render consolidation inappropriate*."[29]

Comcast also emphasized that a complainant must also prove that it has been hindered significantly or prevented from providing satellite-delivered programming. This requires that the complainant must provide serious, credible, individualized proof -- no presumptions; no selective surveys; etc. In light of the many variables and facts that factor into whether a competitor is being significantly hindered or prevented from delivering programming, the Commission should require

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25 *DirecTV FCC Order* ¶ 13.

26 Brief of Petitioner at 1, *Echostar Communications Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002) (No. 01-1032).

27 *EchoStar Communication Corp.*, 292 F.3d at 751-52.

28 *See RCN Telecom Servs. of N.Y., Inc. v. Cablevision Sys. Corp.*, 14 FCC Rcd. 17093 (Cable Servs. Bureau 1999).

29 *DirecTV FCC Order* ¶ 2 n.4 (emphasis added).

compelling proof that the hindrance or prevention was caused by the withholding and not by another factor; the complainant could not mitigate the harm through its own competitive response; the number of consumers the complainant was hindered or prevented from serving was substantial; and the complainant was actually unable to sell its service in the market where the programming is withheld. In addition, to the extent a complainant itself exercises or enforces, directly or indirectly, any exclusivity of programming, affiliated or unaffiliated, on its own platform, the Commission should not entertain the complaint.

Finally, as to both elements of the test, we emphasized that there is no legal or policy reason to remove the burden of proof from the complainant. The burden should be on the complainant to prove that a particular practice is unfair. In addition, the complainant is best positioned to adduce evidence regarding its ability to compete. And to the extent the complainant believes it needs discovery to adduce evidence to prove either prong of the test, it can ask the Commission to order such discovery.

III. THE COMMISSION IS PRECLUDED BY THE DOCTRINE OF RES JUDICATA FROM ALLOWING DIRECTV AND ECHOSTAR TO BRING A SECTION 628 CLAIM AGAINST COMCAST FOR CSN-PHILADELPHIA.

In 1997, DirecTV and EchoStar each filed a program access complaint against Comcast alleging, among other things, that Comcast's refusal to license CSN-Philadelphia was an "unfair" practice in violation of Section 628(b). DirecTV and EchoStar lost in the Bureau,[30] they lost at the full Commission,[31] and they lost in the D.C. Circuit.[32] In other words, DirecTV and EchoStar/Dish Network have already pursued all legal avenues and received final binding determinations that Comcast's practices with respect to CSN-Philadelphia are lawful. Under the doctrines of res judicata and collateral estoppel, the Commission must respect the finality of those decisions, and should clarify that it is not opening the door for those parties to relitigate anew what already has been decided: Subsection 628(b) cannot be invoked to require the licensing of CSN-Philadelphia to DirecTV or EchoStar/Dish Network.

The Supreme Court has noted:

> We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality. . . . The principle holds true when a court has resolved the issue, and should do so equally when the issue has been decided by an administrative agency, be it state or federal.[33]

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30 *See DirecTV Bureau Order* ¶ 34; *EchoStar Order* ¶ 32.

31 *See DirecTV FCC Order* ¶ 14.

32 *See EchoStar Communications Corp.*, 292 F.3d at 757.

33 *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-08 (1999).

The Commission, itself, "has applied both the doctrines of res judicata and collateral estoppel to its own licensing cases with the imprimatur of the courts."[34]

Res judicata means that an issue has been decided finally by a competent authority on the merits, and as a result, the same parties are precluded from relitigating any matters that were at-issue and upon which the decision was rendered.[35] The doctrine "is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise."[36]

DirecTV's and EchoStar's complaints specifically included a claim that Comcast's refusal to license CSN-Philadelphia constituted an "unfair practice" under Section 628(b).[37] The Bureau held that it was not,[38] and DirecTV and EchoStar both filed applications for review to the full Commission again asserting the claim that Comcast's refusal to license CSN-Philadelphia constituted an "unfair practice" under Section 628(b).[39] The Commission held that it was not,[40] and EchoStar appealed that decision to the D.C. Circuit asserting that the Commission's finding that Comcast's refusal to license CSN-Philadelphia violated the Administrative Procedures Act.[41] The D.C. Circuit held that it did

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[34] *In re Montgomery County Media Network*, 4 FCC Rcd. 3749 ¶ 4 (Review Bd. 1989) (citing *Gordon County Broad. v. FCC*, 446 F.2d 1335, 1338 (D.C. Cir. 1971)); *see In re Petition of Budd Broad. Co.*, 14 FCC Rcd. 4366 ¶ 3 (Cable Servs. Bureau 1999) ("The principles of res judicata and collateral estoppel may be applied to prevent agency relitigation of factual disputes.").

[35] *See In re RKO General, Inc.*, 82 F.C.C.2d 291 ¶ 48 (1980).

[36] *Astoria Fed. Sav. & Loan*, 501 U.S. at 107; *see COMSAT Corp. v. IDB Mobile Communications, Inc.*, Memorandum Opinion & Order, 15 FCC Rcd. 7906 ¶ 13 (2000) ("[*Res* Judicata] rests 'largely on the grounds that fairness to the defendant, and sound judicial administration, require that at some point litigation over the particular controversy come to an end.'" (citations omitted)).

[37] *See In re EchoStar Communications Corp. v. Comcast Corp.*, Program Access Complaint, CSR 5244-P, at 13 (May 19, 1998) ("Comcast's unwillingness to negotiate with EchoStar to carry Comcast's regional sports programming . . . constitutes an unfair practice under the Communications Act and the Commission's Rules."); *In re DirecTV, Inc. v. Comcast Corporation*, Program Access Complaint, CSR 5122-P, at 20 (Sept. 23 1997) ("DIRECTV asks that the Commission find that Defendants have violated Sections 628(b) and (c) of the Communications Act . . . through their express refusal to negotiate with DIRECTV regarding the carriage of Comcast SportsNet.").

[38] *See DirecTV Bureau Order* ¶ 32 ("[W]e decline to find that, standing alone, Comcast's decision to deliver Comcast SportsNet terrestrially and to deny that programming to DIRECTV is 'unfair' under Section 628(b)."); *EchoStar Order* ¶ 28 ("Here, we do not believe that Defendants have engaged in unfair or deceptive acts in creating, packaging, and distributing SportsNet.").

[39] *See In re EchoStar Communications Corp. v. Comcast Corp.*, Application for Review, CSR 5244-P, at 17 (Feb. 25, 1999) ("[T]he Bureau effectively ignored EchoStar's specific statutory argument, based on the language of 628(b), that a refusal to sell terrestrial programming can be prohibited under 628(b) if it meets the elements of that section, *i.e.*, if it is unfair. . . ."); *In re DirecTV, Inc. v. Comcast Corp.*, Application for Review, CSR 5122-P, at 20 (Nov. 25, 1998) (arguing that Comcast's "refusal to sell [] programming to DIRECTV or other DBS providers is *precisely* the type of anticompetitive behavior that Congress intended the Commission to address under Section 628(b)").

[40] *See DirecTV FCC Order* ¶ 12 ("We have reviewed the Bureau's disposition of the complaints and find that its ruling was correct and that no basis exists to warrant reversal.").

[41] Brief of Petitioner at 1, *EchoStar Communications Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002) (N0. 01-1032) (listing as one of its three issues in the "Statement of Issues Presented for Review," "Whether the FCC's finding that

not.[42] The rulings at each level, from the Bureau to the D.C. Circuit, held that Comcast did *not* act unfairly or deceptively in choosing not to license CSN-Philadelphia to DirecTV or EchoStar.

DirecTV and EchoStar/Dish Network are the only two providers in Philadelphia without access to CSN-Philadelphia, which necessarily means that they are the only two potential would-be complainants. Any such complaint would also necessarily involve the *same* defendant, Comcast; the *same* network, CSN-Philadelphia; and the *same* statutory subsection, Section 628(b). Given that the parties and issues would be identical to their prior complaint, and that the Commission (affirmed by the D.C. Circuit) expressly ruled against DirecTV and EchoStar on their claim that Comcast's refusal to license CSN-Philadelphia violated Section 628(b), res judicata squarely prevents DirectTV and Echostar/Dish Network from bringing any such complaint in the future.

A holding to the contrary "would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution."[43] The burden on Comcast were the Commission to permit DirecTV or EchoStar/Dish Network to even bring a complaint is even greater under the Commission's current program access procedures. Specifically, the current procedures allow complainants as much time as they want to assemble what evidence they can -- including by conducting consumer surveys and hiring economists to do regression analyses -- against a defendant, but then only provide the defendant with 20 days to respond and try to rebut the complainant's "evidence." More importantly for purposes of res judicata, unlike in the courts, the Commission's process does not provide for a defendant to file a motion to dismiss based on an affirmative defense. Rather, the defendant is forced to raise the affirmative defense of res judicata and any other defense, whether procedural or substantive, at the same time the defendant files its complete answer and evidence to the complaint. Comcast therefore proposed that any new order in this rulemaking make it clear that the Commission is not authorizing parties who have already brought and lost Section 628(b) claims involving a particular network to file new complaints.

Kindly direct any questions regarding this matter to my attention.

Respectfully Submitted,

/s/ Ryan G. Wallach
Ryan G. Wallach

cc: Stuart Benjamin, Joshua Cinelli, Rosemary Harold, Rick Kaplan, Millie Kerr, David Konczal, Nancy Murphy, Austin Schlick, Sherrese Smith, Diana Sokolow

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Comcast and its affiliates did not engage in an 'unfair method of competition or unfair or deceptive act or practice' by refusing to provide its Philadelphia sports programming to EchoStar violated the Administrative Procedure Act").

[42] *See EchoStar Communications Corp.*, 292 F.3d at 757.

[43] *Astoria Fed. Sav. & Loan*, 501 U.S. at 107-08.

ATTACHMENT 1

ANY ORDER EXTENDING THE PROGRAM ACCESS RULES TO TERRESTRIALLY-DELIVERED PROGRAMMING MUST COMPORT WITH THE STATUTORY LANGUAGE OF SECTION 628(B) AND COMMISSION PRECEDENT.

In 1992, Congress enacted the program access provisions to ensure that competing MVPDs would have access to all "satellite cable" or "satellite broadcast" programming. The FCC, affirmed by the courts, has consistently held that the program access rules apply only to satellite-delivered programming. The FCC currently is considering adopting rules using Section 628(b) as a basis for allowing program access complainants to demand access to terrestrially-delivered programming. There are a number of legal and policy concerns about the propriety of this proposal. Independent of those considerations, based on the principles of collateral estoppel and res judicata, the Commission should not and cannot reopen the settled issue of whether Comcast's decision not to license CSN-Philadelphia to DirecTV and Dish Network is "unfair" or "deceptive" or violates Section 628(b).

THE COMMISSION CANNOT IGNORE THE STATUTORY REQUIREMENTS THAT ONLY CONDUCT THAT IS "UNFAIR" OR "DECEPTIVE" AND "HINDERS SIGNIFICANTLY" OR "PREVENTS" THE DISTRIBUTION OF PROGRAMMING VIOLATES SECTION 628(B).

- Section 628(b) states, in relevant part: "It shall be unlawful for a cable operator . . . to engage in *unfair methods of competition or unfair or deceptive acts or practices*, the purpose or effect of which is *to hinder significantly or to prevent* any [MVPD] from providing satellite cable programming."
- The Commission is constrained by the words of the statute: "[W]here a statute 'has directly spoken to the precise question at issue,' the court and the agency 'must give effect to the unambiguously expressed intent of Congress.'" *Alvin Lou Media, Inc. v. FCC*, 571 F.3d 1, 8 (D.C. Cir. 2009) (quoting *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 842-43 (1984)).
- Thus, as the Commission has explained, to establish a violation of Section 628(b), a complainant alleging that programming was withheld must show that: (1) "the defendant has engaged in unfair methods of competition or unfair or deceptive acts or practices"; *and* (2) "the unfair acts or practices, if found, had the purpose or effect of hindering significantly or preventing a MVPD from providing satellite cable programming." *DIRECTV v. Comcast*, 13 FCC Rcd. 21,822 ¶ 32 (Cable Servs. Bureau 1998) ("*DirecTV Order*"); *EchoStar v. Comcast*, 14 FCC Rcd. 2089 ¶ 28 (Cable Servs. Bureau 1999) ("*EchoStar Order*"); *see 1993 Program Access Order*, 8 FCC Rcd. 3359 ¶¶ 36-41 (1993).
- The Commission cannot read out of Section 628(b) the requirement that a defendant's conduct must be "unfair" or "deceptive," and the Commission has previously determined that "standing alone," a decision to deliver programming terrestrially and to deny that programming to competitors is not "'unfair' under Section 628(b)." *DirecTV Order* ¶ 32; *EchoStar Order* ¶ 28 (same).
- The Commission also should not water down the second prong of the test -- that a complainant must demonstrate that any unfair or deceptive practice has the purpose or effect of hindering significantly its ability to deliver satellite cable programming -- to the point where that prong is meaningless.
- The Commission should require compelling proof from complainants that: (1) the hindrance or prevention was caused by the withholding and not by another factor, such as complainant's inability to serve an area, price or quality of complainant's service, complainant's inability to provide all desired services, or the presence in the area of a competing MVPD other than the complainant and defendant; (2) the complainant could not mitigate the harm through its own competitive response, such as providing its own exclusive programming, offering price discounts or promotions, or delivering improved quality; (3) the number of consumers the complainant was hindered or prevented from serving was substantial, for example, showing that the combined subscriber penetration rate of competitors without access to the programming is substantially below the penetration rate in all similar markets where withholding is not an issue; and (4) inability to sell its service in the market where the programming is withheld. In addition, to the extent a complainant itself exercises or enforces, directly or indirectly, any exclusivity of programming, affiliated or unaffiliated, on its own platform, the Commission should not entertain the complaint.

THE COMMISSION'S PRIOR RULINGS ON CSN-PHILADELPHIA SHOULD BE DEFINITIVE UNDER RES JUDICATA AND COLLATERAL ESTOPPEL.

- "'When an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.'" *Morrison v. Int'l Programs Consortium, Inc.*, 253 F.3d 5, 9 (D.C. Cir. 2001) (quoting *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966) (superseded by statute on other grounds)). "And the Commission has applied both the doctrines of res judicata and collateral estoppel to its own licensing cases with the imprimatur of the courts." *In re Montgomery County Media Network*, 4 FCC Rcd. 3749 ¶ 4 (Review Bd. 1989) (citing *Gordon County Broad. v. FCC*, 446 F.2d 1335, 1338 (D.C. Cir. 1971)); *see In re Petition of Budd Broad. Co.*, 14 FCC Rcd. 4366 ¶ 3 (Cable Servs. Bureau 1999) ("The principles of res judicata and collateral estoppel may be applied to prevent agency relitigation of factual disputes.").

- In 1998, DirecTV and Dish Network (then known as EchoStar) filed complaints that squarely raised the issue of whether Comcast's refusal to license them CSN-Philadelphia violated Section 628(b) because it "involve[ed] unfair or anti-competitive action to deprive [MVPDs] of 'satellite cable programming.'" *DirecTV Order* ¶ 22; *EchoStar Order* ¶ 19. DirecTV and Dish "had an adequate opportunity to litigate" the issue of whether the refusal to license them CSN-Philadelphia was "unfair" or "deceptive," and they took advantage of that opportunity before the Cable Services Bureau (now the Media Bureau), the Commission, and the U.S. Court of Appeals for the D.C. Circuit.

- The Bureau ruled unequivocally that terrestrial distribution of CSN-Philadelphia is not an "unfair" or "deceptive" conduct. *See DirecTV Order* ¶ 32 ("[W]e decline to find that, standing alone, Comcast's decision to deliver Comcast SportsNet terrestrially and to deny that programming to DIRECTV is 'unfair' under Section 628(b)."); *EchoStar Order* ¶ 28 (same). "Under [collateral estoppel], a final judgment on the merits in a prior suit precludes subsequent relitigation of issues actually litigated and determined in the prior suit, regardless of whether the subsequent suit is based on the same cause of action." *NextWave Pers. Communications, Inc. v. FCC*, 254 F.3d 130, 147 (D.C. Cir. 2001).

- The Bureau expressly rejected claims that withholding terrestrial programming alone could be an "unfair" or "deceptive" practice: "DIRECTV's argument would have us find that it is. . . unfair for a cable operator to move a programming service from satellite delivery to terrestrial delivery if it means that a competing MVPD may no longer be afforded access to the service. We find no evidence in Section 628 that Congress intended such a result." *DirecTV Order* ¶ 32; *see EchoStar Order* ¶ 28.

- The Commission affirmed the Bureau's decisions. *See DIRECTV v. Comcast*, 15 FCC Rcd. 22,802 ¶ 12 (2000) ("We have reviewed the Bureau's disposition of the complaints and find that its ruling was correct and that no basis exists to warrant reversal.").

- The full Commission ruling was appealed to the D.C. Circuit, and that court unanimously upheld the FCC's ruling, including the determination that withholding of CSN-Philadelphia was not an "unfair" or "deceptive." *See EchoStar Communications Corp. v. FCC*, 292 F.3d 749, 755 (D.C. Cir. 2002) (affirming the Commission and noting "the Commission confirms that its determination that Comcast did not engage in unfair methods of competition or unfair or deceptive acts or practices involved a 'factual inquiry'").

- In the *Adelphia Order*, the Commission affirmed that CSN-Philadelphia is a "unique case" and that its terrestrial delivery "was not chosen for the purpose of enabling anticompetitive behavior." *Adelphia Order* ¶ 163. Accordingly, the arbitration condition devised for regional sports networks did not empower DirecTV or Dish Network to invoke it.

- DirecTV and Dish Network have already pursued all legal avenues and received final binding determinations that Comcast's practices with respect to CSN-Philadelphia are lawful. The Commission must respect the finality of those decisions, and should clarify that it is not opening the door for those parties to relitigate anew what already has been decided: *this* subsection cannot be invoked to require the licensing of *this* network to *these* parties.

ATTACHMENT 2

PROGRAM ACCESS -- KEY FACTS

- In two prior orders affirmed by the Commission and by the U.S. Court of Appeals for the D.C. Circuit, the Bureau held that: (1) CSN-Philadelphia was "not simply a service that has moved from satellite to terrestrial distribution but is in fact a new service"; (2) Comcast's decision to deliver CSN-Philadelphia terrestrially did "not amount to an attempt to evade" the program access rules; and (3) Comcast had legitimate business reasons for delivering CSN Philadelphia terrestrially. *DIRECTV v. Comcast*, 13 FCC Rcd. 21,822 ¶¶ 25-28, 32 (Cable Servs. Bureau 1998) ("*DirecTV Order*"); *EchoStar v. Comcast*, 14 FCC Rcd. 2089 ¶¶ 21-24, 28 (Cable Servs. Bureau 1999) ("*EchoStar Order*"); *see DIRECTV v. Comcast*, 15 FCC Rcd. 22,802 ¶ 12 (2000) ("We have reviewed the Bureau's disposition of the complaints and find that its ruling was correct and that no basis exists to warrant reversal."), *aff'd sub nom. EchoStar Communications Corp. v. FCC*, 292 F.3d 749, 755 (D.C. Cir. 2002).
  - "[W]e believe that it bears repeating that EchoStar never purchased programming from [CSN's predecessors] SportsChannel or PRISM. [CSN-Philadelphia] is a brand new service in ownership, name, management, and content." *EchoStar Order* ¶ 23.
  - Compared to an annual cost of $600,000 to deliver CSN-Philadelphia terrestrially, satellite delivery of the service would have cost over $2 million dollars annually. *EchoStar Order* ¶ 24.
  - "The terrestrial infrastructure used by [CSN's predecessor] PRISM . . . had available capacity and the base of operators receiving the Service is substantially the same as that which received PRISM, so use of that network became a logistically simple and economical choice." *EchoStar Order* ¶ 24. The existing terrestrial infrastructure was a key aspect of investing $150 million in the future of Philadelphia sports, including a new studio, acquiring sports teams, and game rights.
- Although the Commission has yet to address the issue in its orders, *see DIRECTV Order* ¶ 32 n.113; *EchoStar Order* ¶ 28 n.99, there is no evidence that lack of access to terrestrial programming has in any way hindered or prevented competing providers from "*providing satellite cable programming*."
  - For example, in Philadelphia where DirecTV and Dish do not have access to CSN-Philadelphia, since 2002, DBS penetration in Philadelphia has grown from 3.9%, 2002 Exclusivity Ban Extension Order, 17 FCC Rcd. 12,124 ¶ 33 n.107 (2002), to 14.4% as of September 2009 (SNL Kagan/Media Business).
  - Moreover, DBS penetration in Philadelphia is higher than or comparable to that in many other markets where DBS operators have access to all RSNs: as of September 2009, DBS penetration in New York was 12.9%, Boston was 14.64%, Tampa-St. Pete was 15.38%, Baltimore was 16.49%, Hartford & New Haven was 15.6%, Norfolk-Portsmouth was 15.59%, Providence-New Bedford was 10.25%, and Springfield-Holyoke was 14.58%.
- Competing providers' penetration levels in particular DMAs vary based on a number of factors, the vast majority of which are wholly unrelated to the programming they carry.
- In New York, where Verizon and AT&T do not have access to HD versions of the Madison Square Garden Network, in less than 4 years, they have been able to attract 11.48% of the subscribers in the DMA even though they do not offer service to all the households in the DMA. Combined with the DBS penetration of 12.9%, competing providers serve 24.38% of all the households in the DMA.
- Notably, Congress has determined that "effective competition" exists whenever rival MVPDs make service available to over 50% of households and they have achieved 15% penetration.

ATTACHMENT 3

BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

ORAL ARGUMENT SCHEDULED
FEBRUARY 5, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 01-1032

ECHOSTAR COMMUNICATIONS CORPORATION,

PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION,

RESPONDENT.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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GLOSSARY

The 1992 Cable Act	The 1992 Cable Television Consumer Protection and Competition Act
DBS	Direct Broadcast Satellite
MVPD	multi-channel video programming distributor
MSO	multiple system operator
SMATV	satellite master antenna television
CSN	Philadelphia Sports Media
MMDS	multi-channel multi-point distribution systems
OVS	open video systems
BST	basic service tier
GE	General Electric

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BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

STATEMENT OF ISSUES PRESENTED

In this case, EchoStar seeks review of the Federal Communications Commission's decision that Comcast did not violate its program access obligations under Section 628(b) of the 1992 Cable Television Consumer Protection and Competition Act, which is codified in 47 U.S.C. 548(b). That statute, in pertinent part, makes it unlawful for a cable operator to "engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multi-channel video programming distributor from providing satellite cable programming." 47 U.S.C. 548(b).

The issues presented in EchoStar's petition for review are:

1. Whether the Commission reasonably found that Comcast did not commit an unfair or deceptive act when it chose to deliver the programming service at issue terrestrially instead of via satellite, based on findings that the service was a new service and terrestrial delivery offered cost advantages.

2. Whether the Commission abused its discretion when it denied EchoStar's request for discovery.

3. Whether 47 U.S.C. 548(b)'s purpose or effect prong requires the Commission to find a violation even when the Commission has made a factual determination that the defendant has not engaged in an unfair or deceptive act.

STATUTES AND REGULATIONS

Relevant statutes and regulations not included in the Addendum to petitioner's opening brief are set forth in the Appendix to this brief.

JURISDICTION

EchoStar timely filed its petition for review on January 19, 2001. This Court has jurisdiction pursuant to 47 U.S.C. 402(a) and 28 U.S.C. 2342 et seq.

COUNTERSTATEMENT

A. The Federal Statute At Issue.

On October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") to promote competition, with the view that regulation would be transitional until the video programming distribution market becomes competitive. See Pub. L. No. 102-385, 106 Stat. 1460 (1992). Section 601(6) of the Act states that the "purposes of this title are to *** promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable

systems." 47 U.S.C. 521(6). Section 628 of the Act, which is codified at 47 U.S.C. 548, contains the program access provisions. The purpose of these provisions "is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies." 106 Stat. 1493.

Section 628 (b) of the 1992 Cable Act states that:

> [i]t shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

In Section 628 (c)(2), Congress instructs the Commission, inter alia, to promulgate regulations that:

> (A) establish effective safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multi-channel video programming distributor; [and]
>
> (B) prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other MVPDs or their agents or buying groups.

On December 24, 1992, the Commission published a Notice of Proposed Rulemaking to comply with Congress's mandate in Section 628(c) of the 1992 Cable Act. Although several

cable and satellite companies and associations filed comments and reply comments, petitioner EchoStar filed no comments during that rulemaking proceeding. In its comments, intervenor DirecTV contended that the proper construction of the statute is that a program access complaint "states a prima facie case under 628(b) if it alleges that a cable operator or a vertically integrated cable programmer is engaged in a practice that (i) is unfair or deceptive and (ii) represents a significant hindrance to the provision of programming services to consumers by another MVPD." See MM Docket 92-265, DirecTV Comments, dated January 25, 1993, at p. 11 (emphasis added).

On April 30, 1993, the Commission issued its rules implementing Sections 628(b) & (c) of the 1992 Cable Act. See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage, First Report and Order ("Program Access Report and Order"), 8 F.C.C.R. 3359 (1993). The Commission explained that the language of Section 628(b) itself addresses only practices that are (i) "'unfair,' 'deceptive,' or 'discriminatory,' and (ii) "could significantly hinder multi-channel video programming distributors from providing satellite programming to consumers." 8 F.C.C.R. at 3372. With regard to the procedures it will follow when adjudicating program access complaints, the Commission stated that it will "seek to dispose of as many complaint cases as possible on the basis of a complaint, answer and reply. Discovery will not be permitted as a matter of right, but on a case-by-case basis as deemed necessary by the Commission staff reviewing the complaint." Id. at 3389. In Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage, 13 F.C.C.R. 15822

(1998), the Commission sought comments on what procedures should be implemented to obtain "the necessary information disclosure in the most efficient, expeditious fashion possible." Id. at 15828. The Commission again rejected requests to adopt the discovery rules in the Federal Rules of Civil Procedure. Ibid.

B. Factual Background.

EchoStar is a direct broadcast satellite ("DBS") provider that offers multi-channel video programming distribution ("MVPD") service to subscribers across the continental United States. In the Matter of EchoStar Communications Corp. v. Comcast, 14 F.C.C.R. 2089, 2091 (1999) (JA 480, 482). EchoStar operates three DBS satellites to offer up to 200 channels of digital programming. As an MVPD, EchoStar competes directly with cable operators in each and every cable franchise area, including the Philadelphia metropolitan area. Comcast is a multiple system operator ("MSO") based in Philadelphia that owns and operates cable systems and cable programming services. Id. at 2092 (JA 482, 483).

In July 1996, Comcast acquired a 66% interest in the Philadelphia Flyers L.P., to form a new partnership named Comcast-Spectacor, L.P. Comcast-Spectacor owns the following assets: 1) the Philadelphia Flyers National Hockey League ("NHL") team; 2) the Philadelphia 76ers National Basketball Association ("NBA") team; and 3) the CoreStates Spectrum and CoreStates Center sports arenas. Also in 1996, Comcast-Spectacor entered into a partnership with the Philadelphia Phillies Major League Baseball ("MLB") team to form Philadelphia Sports Media, L.P. Id. at 2092 (JA 483).

SportsChannel Philadelphia ("SportsChannel") and PRISM were commonly owned cable networks that served the Philadelphia market. Id. at 2092 (JA 483). SportsChannel was a satellite delivered basic tier network that offered numerous Philadelphia professional major

league sport contests, including Philadelphia Flyers hockey games, Philadelphia 76ers basketball games, and Philadelphia Phillies baseball games. PRISM was a network that produced and distributed movies and other entertainment programming, including Philadelphia professional major league sport contests. Unlike SportsChannel, PRISM was delivered through terrestrial technology, and its programming was available only as a premium priced subscription service. Both SportsChannel and PRISM terminated operations on September 30, 1997. 14 F.C.C.R. at 2092 (JA 483). EchoStar never carried SportsChannel or PRISM programming. Id. at 2093 (JA 484).

On October 1, 1997, Comcast SportsNet ("SportsNet") debuted as a new channel on Comcast's, and other cable operators', basic service tier ("BST") in the Philadelphia market. 14 F.C.C.R. at 2093 (JA 484). Comcast distributes SportsNet only through terrestrial microwave and fiber technology. In addition to the professional sporting events previously offered through SportsChannel and PRISM, SportsNet's programming includes various professional and collegiate sporting events that had not been carried on either channel. Ibid. SportsNet offers locally produced programming, such as sports-related talk-shows and sports news shows. These shows are all original and have never appeared before on any programming service, including SportsChannel and PRISM. Ibid.

Comcast licenses SportsNet programming to a wide variety of MVPDs in the Greater Philadelphia market, including local cable operators, wireless cable systems, also known as multichannel multipoint distribution systems ("MMDS"), satellite master antenna television ("SMATV") providers, and potential open video systems ("OVS"). In letters dated December 9, 1997, and December 31, 1997, EchoStar attempted to negotiate with Comcast for the carriage rights of SportsNet's programming including a request for a copy of SportsNet's affiliation

agreement and applicable rate card. EchoStar's efforts were unsuccessful. In a letter to EchoStar, dated January 7, 1998, the general counsel of Comcast-Spectacor, L.P. stated that SportsNet's programming would not be available to "any satellite delivered service in the Philadelphia market." Id. at 2093 (JA 484).

C. The Program Access Proceedings.

1. On September 23, 1997, DirecTV filed a program access complaint against Comcast with the Federal Communications Commission's Cable Services Bureau. See In the Matter of DirecTV v. Comcast, 13 F.C.C.R. 21822, 21827 (JA 442, 447).[1] On May 20, 1998, EchoStar filed its complaint with the Bureau. Both complaints were based on substantially similar allegations that Comcast's refusal to sell SportsNet programming to EchoStar or DirecTV violated the program access provisions of the 1992 Cable Act, specifically both 47 U.S.C. 548(b) and (c).[2] 14 F.C.C.R. at 2098 (JA 489). EchoStar contended that Comcast's refusal to offer its regional sports programming to EchoStar and other DBS providers constituted an impermissible refusal to sell in violation of 47 U.S.C. 548(c)(2)(B). 14 F.C.C.R at 2093 (JA 484). EchoStar alleged that Comcast decided to distribute SportsNet's programming through terrestrial means in order to evade application of the program access rules. Therefore, according to EchoStar, Comcast's terrestrial delivery of SportsNet and its refusal to offer SportsNet to EchoStar was an unfair or deceptive act that violated 47 U.S.C. 548(b). EchoStar further contended that, even if Comcast's terrestrial delivery of SportsNet was not an unfair act, it violated 47 U.S.C. 548(b)

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[1] DirecTV is an intervenor to this petition for review. It has not, however, filed a brief. Consequently, the Commission's brief focuses on EchoStar's arguments.

[2] All of the pleadings cited in the government's brief are the public versions, in which confidential material has been redacted. See Certified List of Items in the Record, dated March 12, 2001.

because it significantly hinders EchoStar from providing satellite cable programming. Id. at 2094 (JA 485).

Comcast filed its answer on June 19, 1998. 14 F.C.C.R. at 2096 (JA 487). Comcast contended that its terrestrial distribution of SportsNet was a rational and legitimate business decision because terrestrial distribution of that local programming is significantly less expensive than satellite distribution. In support of this contention, Comcast presented, among other things, a sworn affidavit from Sam Schroeder, a senior Vice President of Programming and Operations at Philadelphia Sports Media (CSN), an affiliate of Comcast. See Comcast Answer to Program Access Complaint, Exhibit 3, p. 3 (JA 409). Mr. Schroeder stated that "[i]t costs approximately six hundred thousand dollars ($600,000) per year for CSN to deliver [SportsNet] via microwave and fiber optic cable to the sixty headends currently receiving the signal. If CSN were to deliver the service via a full band transponder (although to [his] knowledge there are no full band transponders that have available space) it would cost approximately two million two hundred eighty thousand dollars ($2,280,000) per year. If CSN were to deliver the service via a second tier transponder, such as GE-7, it would cost approximately one million four hundred thousand dollars ($1,400,00) per year. CSN would also have to pay approximately twenty-four thousand dollars ($24,000) per year to uplink the signal, and a one-time cost of a quarter million dollars ($250,000) to build an earth station uplink facility," and a cost of $190,000 for encoding the signal prior to uplinking it and for decoding it at the headend of the individual recipients. Ibid. Mr. Schroeder explained that because SportsNet "is a regional service that is not distributed outside of the Greater Philadelphia area, there is no reason to put the service on a satellite and incur the significantly higher distribution costs." Ibid. Mr. Schroeder also stated that the terrestrial infrastructure used by PRISM had available capacity and the base of operators

receiving SportsNet consists of the same operators who received PRISM. It was, therefore, "both logically simple and economical to use the microwave and fiber optic cable system that was already in place for the delivery of PRISM." Ibid.

EchoStar replied that Comcast's claim of cost savings was not a valid basis to move to terrestrial delivery of SportsNet. 14 F.C.C.R. at 2094 (JA 485). EchoStar alleged that Comcast's primary reason to switch to terrestrial facilities was to avoid application of the Commission's rules and thus secure the additional monopoly rents available from exclusive carriage of SportsNet. EchoStar did not present any economic analysis to rebut Mr. Schroeder's affidavit. EchoStar argued that, after Comcast had already made a decision to deliver SportsNet terrestrially, it and other DBS providers offered to share in SportsNet's satellite distribution costs. EchoStar further noted that it has a well-established and recognized record of creditworthiness and financial stability. Ibid.

2. On October 27, 1998, the Cable Services Bureau rejected DirecTV's program access complaint against Comcast. In the Matter of DirecTV, 13 F.C.C.R. 21822 (JA 442). The next day, EchoStar filed a motion to compel production of documents contending that it "must seek discovery in this proceeding in light of the Bureau's recent decision denying the complaint filed by DirecTV." EchoStar Motion to Compel at p.2 (JA 460). EchoStar did not specify that it sought discovery to challenge Mr. Schroeder's assessment about the costs saved by delivering SportsNet terrestrially instead of via satellite. Nor did EchoStar seek discovery to challenge evidence that SportsNet's programming content is different from that of SportsChannel Philadelphia. EchoStar repeatedly contended that it had presented sufficient evidence to establish that Comcast had violated sections (b) and (c) of 47 U.S.C. 548. Id. at 3-6 (JA 461-464). EchoStar claimed that it needed additional documentation in the event the Commission

rejected EchoStar's claim that Comcast's terrestrial delivery of SportsNet was based on improper motives. Id. at 6 (JA 464). EchoStar claimed that two admissions by Comcast's personnel warranted discovery. The first admission, which EchoStar had included in its complaint, was made by Comcast's Chief Executive Officer, Brian Roberts, as reported by Vanity Fair in its October 1997 publication of the Third Annual Fifty Leaders of the Information Age. That article stated that "Comcast's purchase of the Philadelphia Flyers, 76ers, and Phantoms inspired the company to start up a regional sports network, which debuts [in October 1997] as a basic cable service channel." The article also stated that "[t]he question now is whether Roberts can capitalize on an apparent loophole in the 1996 Act in order to lock up the Philly area's sports programming." The next sentence in the article is an alleged quote from Mr. Roberts: "We don't like to use the words corner the market because the government watches our behavior." Id. at 6 (JA 464). EchoStar also alleged that Comcast personnel, whom EchoStar did not name, stated, during a July 23, 1998, meeting at the Federal Communications Commission, that Comcast's refusal to deal with EchoStar was a purposeful decision related to competition. Id. at 6 (JA 464). There is no transcript of that meeting. EchoStar's motion requested "all documents relating to Comcast's use of terrestrial transmission facilities to provide its regional sports programming and its refusal to deal with EchoStar and/or other MVPDs." Id. at 7 (JA 465). Comcast opposed EchoStar's motion (JA 469).

3. On January 26, 1999, the Cable Services Bureau issued its order rejecting EchoStar's claims. See In the Matter of EchoStar Communications Corp. v. Comcast, 14 F.C.C.R. 2089 (1999) (JA 480). The Bureau first rejected EchoStar's contention that Comcast violated Section 628(c) of the 1992 Cable Act (47 U.S.C. 548(c)). The Bureau held that Congress did not intend that statutory provision to apply to terrestrially delivered services. Id. at 2099 (JA 490). The

Bureau explained that the legislative history of Section 628 "indicates that the version of the program access provision that the Senate adopted would have extended to terrestrially-delivered programming services but the House bill, that was eventually adopted, did not. This indicates a specific intention to limit the scope of the provision to satellite services." Id. at 2099 & n.86 (JA 490), citing H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. at 91-3 (1992).

The Bureau next assumed that it had authority to prohibit acts taken to evade the program access obligations and found that the totality of the circumstances did not show that Comcast had acted to evade the program access provisions. 14 F.C.C.R. at 2099 (JA 490). The Bureau found that SportsNet was "in fact a new service" and the decision to deliver it terrestrially was based on legitimate business reasons. Id. at 2100 (JA 491). The Bureau explained that the majority of programming content on SportsNet is not duplicative of the content on SportsChannel Philadelphia, which had been a satellite delivered service. A significant amount of the sports content on SportsNet had previously been on PRISM which was a terrestrially delivered service. The Bureau further noted that EchoStar had never purchased programming from SportsChannel Philadelphia or PRISM. Id. at 2100 (JA 491). The Bureau therefore concluded that "SportsNet is a brand new service in ownership, name, management, and content. It is described as featuring more locally-produced sports coverage -- including events, news, and programming -- than any other regional sports network in the United States." Ibid. (emphasis added).

The Bureau found that Mr. Schroeder's affidavit, which explained that it would have cost, at a minimum, several hundred thousand dollars per year more to deliver SportsNet via satellite rather than by terrestrial means, supports the conclusion that the decision to deliver SportsNet terrestrially was based upon legitimate business reasons and was not done to evade the program access obligations. 14 F.C.C.R. at 2101 (JA 492). The Bureau noted that EchoStar

presented no evidence that its "uplinking offer, though publicly articulated, was ever formally presented to Comcast." Id. at 2102 n.98 (JA 493). The Bureau concluded that EchoStar's offer to share the uplink costs "does not alter the logic of [Comcast's] initial business decision to utilize terrestrial delivery methods." Id. at 2101 (JA 492).

The Bureau next rejected EchoStar's contention that Comcast violated 47 U.S.C. 548(b). The Bureau explained that this statutory provision requires it to conduct a two-step inquiry. "First, the Commission must determine that the defendant has engaged in unfair methods of competition or unfair or deceptive acts or practices. Second, the Commission must determine that the unfair acts or practices, if found, had the purpose or effect of hindering significantly or preventing a MVPD from providing satellite cable programming to subscribers or consumers." Id. at 2102 (JA 493). The Bureau concluded that because it did not find "that the record supports a conclusion that [Comcast] ha[s] engaged in unfair or deceptive acts in creating, packaging and distributing SportsNet," it "need not address whether such actions had the purpose or effect of hindering significantly or preventing a MVPD from providing satellite cable programming to subscribers." Id. at 2102 & n.99 (JA 493).

The Bureau also rejected EchoStar's alternative argument that, even if the Bureau finds that Comcast did not evade the program access rules, it should still find a violation of Section 628(b) because Comcast's refusal to allow EchoStar to carry regional sports programming in Philadelphia hinders EchoStar's ability to sell other programming which qualifies as "satellite cable programming." Id. at 2095, 2103 (JA 486, 494). The Bureau found no evidence in the program access statute that Congress intended such a result. Id. at 2102 (JA 493). The Bureau explained that 628(b) gives the Commission "jurisdiction to adopt additional rules or to take additional action to accomplish statutory objectives should additional types of conduct emerge as

barriers to competition." But, that does not mean 628(b) should "be converted into a tool, that on a per se basis, precludes cable operators from exercising competitive choices that Congress deemed legitimate." Id. at 2103 (JA 494).

Finally, the Bureau rejected EchoStar's Motion to Compel Production of Documents. The Bureau began by noting that EchoStar stated several times in that motion that it has presented sufficient evidence to find violations of Section 628. Id. at 2103-04 (JA 494-495). The Bureau rejected EchoStar's contention that discovery was necessary here because the facts underlying DirecTV and EchoStar's complaints were different in one important respect: EchoStar did not have exclusive programming rights; whereas DirecTV did. EchoStar believed this significant because, according to EchoStar, Comcast representatives stated that it withheld its sports programming from certain competitors because those competitors enjoyed exclusive programming rights. Id. at 2103 (JA 494). The Bureau concluded that those "facts do not serve to alter [its] conclusions herein or persuade [it] that discovery is warranted." Id. at 2103 (JA 494).

4. On February 25, 1999, EchoStar filed its Application for Review of the Bureau's Order and reiterated the claims it made before the Bureau. On November 20, 2000, the Commission consolidated EchoStar's and DirecTV's Applications for Review and denied them. In the Matter of DirecTV & EchoStar v. Comcast, 15 F.C.C.R. 22802 (2000) (JA 553).

With regard to EchoStar's complaint under Section 628(c), the Commission agreed with the Bureau that "[t]he language of Section 628(c) of the Communications Act expressly applies to satellite cable programming and satellite broadcast programming." Therefore, the Commission concluded that "the Bureau properly found that Section 628(c) had not been

violated regardless of Comcast's decision to deliver SportsNet terrestrially." Id. at 22807 (JA 558). [3]

The Commission similarly agreed with the Bureau's denial of EchoStar's 628(b) complaint. The Commission acknowledged "that there may be some circumstances where moving programming from satellite to terrestrial delivery could be cognizable under 628(b) as an unfair method of competition or deceptive practice if it precluded competitive MVPD's from providing satellite cable programming." Id. at 22807 (JA 558). The Commission, however, found Comcast's actions were not unfair acts under 628(b). It explained that the "Bureau found that the service in question was not a service that was moved from satellite to terrestrial distribution, but is in fact a new service," and there was evidence of the cost advantages of terrestrial delivery. The Commission found that these savings were not disputed below or in this proceeding. Id. at 22808 (JA 559). The Commission was not persuaded by EchoStar's contention that it was willing to offset the cost of uplinking SportsNet's signal to satellite because it found that "the record contains no evidence that such offers were conveyed to Comcast other than through legal briefs filed during the program access proceeding," and neither DBS provider stated "how much of the uplink cost each would be willing to bear." Id. at 22808 (JA 559).

SUMMARY OF THE ARGUMENT

1. The Commission reasonably found that Comcast did not engage in any unfair or deceptive acts or practices within the meaning of Section 628(b) of the 1992 Cable Television Consumer and Competition Act when it decided to use terrestrial rather than satellite means for delivering its SportsNet cable programming service. That conclusion might have been different

[3] EchoStar expressly states in its initial brief that it "does not contest [the Commission's ruling under Section 628(c)] in this case." EchoStar Br. 3.

if Comcast had moved an existing programming service from satellite to terrestrial delivery. The Commission found, however, that SportsNet was in fact a new service and not the continuation of an existing service delivered via satellite. Substantial evidence in the record supports this finding. The Commission also found that significant cost advantages supported the decision to use terrestrial, as opposed to satellite, means for delivering this new service. These factual findings justified the Commission's conclusion that no further inquiry under Section 628(b) was warranted.

EchoStar relies on a magazine article in which Comcast's President reportedly laughed at, and did not deny a suggestion, that the decision to use terrestrial means for delivering SportsNet might have the effect of locking up the Philadelphia area's sports programming. There is nothing, however, in that evidence cited by EchoStar to require the Commission to alter its conclusion that Comcast had not engaged in an unfair act with respect to SportsNet.

2. The Commission was not required to grant EchoStar its requested discovery. A complaint proceeding before an administrative agency can and often is resolved solely on the written pleadings. EchoStar has presented no justification for the Court to overturn the Commission's conclusion that the written pleadings, without further discovery, were sufficient for resolving EchoStar's complaint. The timing of EchoStar's request for discovery, and the content of that request, indicate that the request was really nothing more than an attempt to reargue its case.

3. Contrary to EchoStar's argument, Section 628(b) does not mandate that the Commission find a violation "so long as it finds that a competing distributor is hampered in the provision of satellite cable programming." EchoStar Br. 51. That interpretation improperly reads the unfair or deceptive act test right out of the statute.

ARGUMENT

I. THE COMMISSION CORRECTLY FOUND THAT COMCAST'S ACTIONS DID NOT CONSTITUTE UNFAIR OR DECEPTIVE ACTS

A. Standard of Review

When reviewing the Commission's findings of fact, this Court asks whether they are arbitrary or capricious. See Bangor Hydro-Electric Co. v. FERC, 78 F.3d 659, 663 & n.3 (D.C. Cir. 1996). In its opening brief, EchoStar contends that, under 5 U.S.C. 706(2)(E), this Court should review the Commission's facts under the substantial evidence standard. EchoStar Br. 25. As an initial matter, it is not clear that the substantial evidence standard articulated in 5 U.S.C. 706(2)(E) was intended to apply to proceedings that, as in this case, were conducted without a hearing. That statute refers to cases "subject to sections 556 and 557 of [the APA] or otherwise reviewed on the record of an agency hearing provided by statute." Sections 556 and 557 of Title 5 of the United States Code address the procedures that must be followed when hearings are conducted under those provisions.

In any event, in Bangor Hydro-Electric Co., this Court explained that the substantial evidence standard was not intended to "establish a more rigorous standard of factual support [than the arbitrary and capricious standard] but to emphasize that in the case of formal proceedings the factual support must be found in the closed record as opposed to elsewhere." 78 F.3d at 663 n.3. This Court affirms agency findings that rest on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Burlington Northern R. Co. v. Surface Trans. Bd., 114 F.3d 206, 210 (D.C. Cir. 1997) (internal citations omitted). This Court has also indicated that "an agency's conclusion may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary

view." Secretary of Labor, Mine Safety and Health Admin. v. Federal Mine Safety and Health Review Comm'n., 111 F.3d 913, 918 (D.C. Cir. 1997).

B. Comcast's Decision To Deliver SportsNet Terrestrially Was Not An UnFair or Deceptive Act or Practice, Under Section 628(b). Uncontested Evidence Showed SportsNet Was a New Service And It Costs Far Less To Deliver SportsNet Terrestrially.

Under Section 628(b) of the Cable Television Consumer Protection and Competition Act, the Commission conducts a two-part factual inquiry. First, the Commission asks whether the defendant has engaged in unfair methods of competition or unfair or deceptive acts or practices. If the Commission finds the defendant has engaged in unfair acts or practices, the Commission must then make a factual determination whether that act has the purpose or the effect of hindering significantly or preventing a MVPD from providing satellite cable programming to subscribers or consumers. 47 U.S.C. 548(b).

In this case, EchoStar contends that Comcast violated Section 628(b) because it moved SportsNet to terrestrial delivery in order to evade the program access provisions. The Commission did not dispute that a decision to move an existing service from satellite to terrestrial delivery might implicate Section 628(b). The Commission agreed with the Bureau's finding that this case did not present that situation because SportsNet was "in fact a new service" and, therefore, this was not an instance in which the program could be said to have been moved from satellite delivery to terrestrial delivery. 15 F.C.C.R. at 22807-08 (Commission Order) (JA 558-559); 14 F.C.C.R. at 2100 (Bureau Order) (JA 491).

The record fully supports the Commission's findings. As an initial matter, EchoStar did not contest the finding that SportsNet was a new service. The evidence Comcast presented clearly established that a majority of programming content on SportsNet is not duplicative of the

content on the previous satellite delivered service, i.e., SportsChannel Philadelphia. 14 F.C.C.R. at 2100 (JA 491). A significant amount of the sports content was on PRISM, which had been a terrestrially delivered service. The Bureau further noted that EchoStar had never purchased programming from either SportsChannel Philadelphia or PRISM. Ibid. at 2100 (JA 491). The Bureau therefore concluded that "SportsNet is a brand new service in ownership, name, management, and content. It is described as featuring more locally-produced sports coverage -- including events, news, and programming -- than any other regional sports network in the United States." Ibid.

The Commission also found that sound business reasons supported Comcast's decision to deliver SportsNet terrestrially because Comcast presented overwhelming evidence that it costs far less to deliver SportsNet terrestrially rather than via satellite. Comcast presented, among other things, a sworn affidavit from Sam Schroeder, a senior Vice President of Programming and Operations at Philadelphia Sports Media (CSN), an affiliate of Comcast. See Comcast Answer to Program Access Complaint, Exhibit 3, p. 3 (JA 253). Mr. Schroeder stated that "[i]t costs approximately six hundred thousand dollars ($600,000) per year for CSN to deliver [SportsNet] via microwave and fiber optic cable to the sixty headends currently receiving the signal. If CSN were to deliver the service via a full band transponder (although to [his] knowledge there are no full band transponders that have available space) it would cost approximately two million two hundred eighty thousand dollars ($2,280,000) per year. If CSN were to deliver the service via a second tier transponder, such as GE-7, it would cost approximately one million four hundred thousand dollars ($1,400,00) per year. CSN would also have to pay approximately twenty-four thousand dollars ($24,000) per year to uplink the signal, and a one-time cost of a quarter million dollars ($250,000) to build an earth station uplink facility," and a cost of $190,000 for encoding

the signal prior to uplinking it and decoding at the headend of the individual recipients. Mr. Schroeder explained that because SportsNet "is a regional service that is not distributed outside of the Greater Philadelphia area, there is no reason to put the service on a satellite and incur the significantly higher distribution costs." Ibid.

In its opening brief, EchoStar challenges the Commission's reliance on Mr. Schroeder's cost assessment. EchoStar Br. 30. EchoStar did not, however, present any evidence below to rebut Mr. Schroeder's assessment of the costs of delivering SportsNet via satellite. The fact that EchoStar, a satellite provider, did not present evidence to counter Mr. Schroeder's assessment justified the Commission in relying on that assessment.

EchoStar asserted to the Commission that, after Comcast had already determined that it was most cost effective to deliver SportsNet terrestrially, EchoStar made an offer to "split" the uplink costs with Comcast. EchoStar Br. 13; EchoStar Complaint at 12 (JA 340). As the Commission and Bureau found, EchoStar did not present any evidence that it had formally made this offer to Comcast prior to the program access proceedings. Nor did EchoStar detail how much of the uplink costs it would "split" with Comcast. See 15 F.C.C.R. at 22808 (Commission Order) (JA 559); 14 F.C.C.R. at 2101 (Bureau Order) (JA 492). See The Status of Competition Among Video Delivery Systems: Hearing Before the House Subcommittee on Telecommunications, Trade, and Consumer Protection, 105th Cong. 47 (1997) at 135 (testimony of Charles Ergen, EchoStar Chief Executive Officer, stating an offer to "help pay Mr. Robert's cost to put that signal up on satellite"). EchoStar's offer to "split" the costs with Comcast, or "help pay [Comcast's cost]" is a suggestion that Comcast should incur some costs to deliver SportsNet via satellite. After Comcast had already determined that it was most cost effective to deliver SportsNet terrestrially, it would be illogical for Comcast to incur any costs to deliver

SportsNet via satellite unless EchoStar made a strong showing why that would be financially worthwhile for Comcast to do. EchoStar's vague, not formal, "offer" to "split the cost" for uplinking to a satellite is hardly persuasive in this context.

Nor does the October 1997 Vanity Fair article, to which EchoStar refers, contradict Comcast's evidence that justified its decision to deliver SportsNet terrestrially. That article was part of Vanity Fair's Third Annual Report on the "Fifty Leaders of the Information Age." The article begins by listing some of Brian Roberts's "deals and deeds," such as his dealings with Michael Eisner. The article then states how "Comcast's purchase of the Philadelphia Flyers, 76ers, and Phantoms inspired the company to start up a regional sports network, which debuts [October 1997] as a basic cable service channel." The next sentence, which is where EchoStar starts its quote, states "The question now is whether Roberts can capitalize on an apparent loophole in the 1996 Telecommunications Act in order to lock up the Philly area's sports programming." The article then allegedly quotes Roberts as saying "'We don't like to use the words 'corner the market' because the government watches our behavior, Roberts says with a laugh. Let's just say we've been able to do things before they're in vogue." (JA 338).

The Commission and the Bureau were correct to conclude that the above article from an entertainment magazine does not alter the conclusion that there were cost advantages of terrestrial delivery. As an initial matter, program access provisions were enacted in the 1992 Cable Television Act, not the 1996 Telecommunications Act. Even assuming, for the sake of argument, that the article is accurate, the part of the article that says SportsNet "debuts [October 1997] as a basic cable service channel" fully supports the Commission and Bureau's findings that SportsNet is a new programming service that is being delivered terrestrially. There is nothing in Mr. Robert's alleged quotes to suggest that Comcast did anything unfair or to cast

doubt on the claim of significant cost advantages from terrestrial delivery. Moreover, in his testimony before the House Subcommittee on Telecommunications, Trade and Consumer Protection, on October 30, 1997, Mr. Roberts denied ever making a statement that Comcast intended to "corner the market." See The Status of Competition Among Video Delivery Systems: Hearing Before the House Subcommittee on Telecommunications, Trade, and Consumer Protection, 105th Cong. 47 (1997) at 134. In that hearing, Mr. Roberts also explained that "[terrestrial delivery] costs [Comcast] less than half of what satellite would cost." Id. at 103. EchoStar apparently would ask the Commission to base a finding of an unfair or deceptive act on a magazine's report of "a laugh." The Commission was wise to reject that invitation.

Accordingly, this Court should reject EchoStar's contentions and find that the record fully supports the Commission's finding that Comcast's decision to deliver SportsNet terrestrially was not an unfair or deceptive act or practice.

II. THE COMMISSION CORRECTLY DENIED ECHOSTAR'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

A. Standard of Review

This Court reviews the Commission's decision not to grant a request for discovery with "extreme deference." See Hi-Tech Furnace Systems, Inc v. FCC, 224 F.3d 781, 789 (D.C. Cir. 2000), quoting Lakeland Bus Lines v. ICC, 810 F.2d 280, 286 (D.C. Cir. 1987). "[T]he conduct and extent of discovery in agency proceedings is a matter ordinarily entrusted to the expert agency in the first instance and will not, barring the most extraordinary circumstances, warrant the Draconian sanction of overturning a reasoned agency decision." Id. at 789, quoting Trailways Lines v. ICC, 766 F.2d 1537, 1546 (D.C. Cir. 1985).

B. The Commission Correctly Exercised Its Broad Discretion In Considering Discovery Requests. EchoStar's Untimely Motion Was Insufficient To Warrant Discovery.

EchoStar filed its Motion to Compel Production of Documents with the Cable Services Bureau. The Bureau rejected the motion because "facts [alleged in the affidavit] do not serve to alter [its] conclusions herein or persuade [it] that discovery is warranted." 13 F.C.C.R. at 2103 (JA 494). The Commission denied the application for review as to that issue without any discussion and therefore the court should look to the Bureau's decision and treat it as having become that of the Commission for purposes of the discovery issue. See, e.g., 47 U.S.C. 155(c) (Commission may deny applications for review without specifying any reasons).

The Commission's decision to deny discovery requests is entitled to the broad discretion this Court accords such agency decisions. In Hi-Tech Furnace Systems, Inc., this Court upheld the Commission's decision to deny a party's discovery request brought under Section 208 of the Communications Act, which sets forth general procedures for the Commission to follow when investigating complaints against common carriers. In reaching this decision, the Court held that "[n]othing in either the Communications Act or the APA entitles a party to the specific procedures Hi-Tech demands." Id. at 789-790. The Court further explained that it has repeatedly recognized that "[c]omplaint proceedings under the Communications Act, unlike court litigation or administrative-trial type hearings, are often resolved solely on the written pleadings," and the Commission has properly "'placed limitations on the scope and methods of discovery in its formal complaint proceedings that do not exist in trials governed by the Federal Rules.'" Id. at 790, citing and quoting American Message Ctrs. v. FCC, 50 F.3d 35, 41 (D.C. Cir. 1993).

Similar to Section 208, Congress directed the Commission, in Section 628 of the 1992 Cable Television Consumer Protection and Competition Act, to issue rules that would "provide for an expedited review" of program access complaints and gave the Commission discretion to "collect data" necessary to effectuate Section 628's purposes. Just as with Section 208 complaints, the Commission chose, when reviewing program access complaints brought under Section 628, not to adopt the same methods of discovery that exist in trials governed by the Federal Rules of Civil Procedure. In its 1993 Order implementing Section 628, the Commission stated that "[d]iscovery will not be permitted as a matter of right, but on a case-by-case basis as deemed necessary by the Commission staff reviewing the complaint." See In Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage, First Report and Order ("Program Access Report and Order"), 8 F.C.C.R. 3359 (1993).

The Commission correctly exercised its discretion here. The timing of EchoStar's Motion to Compel and the arguments it makes demonstrates that its motion was not a reasonable, timely, request for discovery but a wholly unavailing attempt to stave off an imminent adverse decision from the Cable Services Bureau. EchoStar filed the Motion to Compel -- its first request for discovery -- on October 28, 1998, some five months after it had filed its program access complaint; but only one day after the Bureau had issued its order denying DirecTV's program access complaint. As the Commission noted in consolidating the DirecTV and EchoStar's Applications for Review, EchoStar and DirecTV's program access complaints were based on similar grounds and facts. 15 F.C.C.R. at 22803 (JA 554). The most apparent explanation for EchoStar's sudden request for discovery was not any legitimate need for information but a "last-ditch" effort to reargue its case before the Bureau because it believed the

Bureau might be close to reaching the same conclusion about its program access complaint that it had with regard to DirecTV's.

A review of the Motion to Compel fully supports that conclusion. EchoStar spends the majority of its argument in the motion explaining why it has already proven its case; it states on at least four occasions that it has provided "enough," "sufficient," "significant" or "ampl[e]," evidence to support its Section 628(c) and (b) claims. See EchoStar Motion To Compel at pp. 3-6 (JA 461- 464). EchoStar also summarizes the evidence in the record that it believes is sufficient for the Bureau to render judgment in its favor. Id. at 6 (JA 464). EchoStar's theory why it should be granted discovery is best summarized by the following quote from its Motion: "if the Commission were somehow to view this evidence as insufficient, EchoStar should be allowed an opportunity to meet its burden of proof in that regard through discovery." EchoStar Motion to Compel at 6 (JA 464). Whether an adjudicating agency believes a complainant has proven its case is quite clearly not a proper test for determining if a discovery request should be granted. Such a standard would lead to endless discovery.

The correct rule, which the Bureau used, is whether the discovery EchoStar sought was necessary for the Bureau to render its decision. Program Access Report and Order, 8 F.C.C.R. at 3386. EchoStar did not meet that burden. The Bureau ruled against EchoStar, just as it had earlier against DirecTV, on the Section 628(b) claim because it found that Comcast had legitimate business reasons for delivering SportsNet terrestrially. The Bureau found that SportsNet is a new programming service and that it is far less expensive to deliver SportsNet terrestrially rather than via satellite. See In the Matter of EchoStar Communications Corp., 14 F.C.C.R. at 2099-2101 (JA 490-492); In the Matter of DirecTV, Inc. v. Comcast, 13 F.C.C.R. 21822, 21836 (1998) (JA 442, 456). In its Motion to Compel, EchoStar did not seek information

that would specifically address the Bureau's findings on those factual issues. EchoStar's request more generally, and vaguely, sought "further corroborative evidence about the unfairness of Comcast's conduct as well as Comcast's motives." EchoStar Motion to Compel at 6 (JA 464). The breadth of EchoStar's request was also unreasonable. It sought "all documents relating to Comcast's use of terrestrial transmission facilities to provide its regional sports programming and its refusal to deal with EchoStar and/or other MVPDs." Id. at 7 (JA 465).

EchoStar's Motion to Compel alleges that at a July 23, 1998, meeting at the Federal Communications Commission, Comcast representatives made an admission that warranted further discovery. "Comcast representatives explained that Comcast decided to withhold its sports programming from certain competitors to counter those competitors own exclusive programming." EchoStar Motion to Compel at 3 (JA 461). EchoStar asserts that fact is new and, unlike DirecTV, it does not have exclusive sports programming. EchoStar did not present any evidence to support that assertion. In any event, even assuming its accuracy, the substance of that assertion is neither new nor significant enough to warrant further discovery. Comcast informed the Bureau in its Answer, filed on June 19, 1998, that "EchoStar does not promote exclusive sports programming." Comcast Answer at p. 26 (JA 382). It does not warrant discovery because, as the Bureau determined, it does not alter the Bureau's conclusion that legitimate business reasons supported Comcast's decision to deliver SportsNet terrestrially. Comcast made its decision to deliver this new programming service terrestrially because it was dramatically less expensive than delivering the service via satellite. 14 F.C.C.R. at 2103 (JA 494). EchoStar made no showing that it communicated a formal offer to Comcast that would

make it worthwhile for Comcast to incur costs (it had wanted to avoid) to deliver SportsNet via satellite. See, supra, at pp. 21-22.[4]

EchoStar's reliance upon Commissioner Tristani's dissent in the Matter of RCN Telecom Services of New York v. Cablevision Systems Corp., 16 F.C.C.R. 12048 (2001) is unavailing. As an initial matter, it is a dissent and therefore not controlling precedent. Furthermore, Commissioner Tristani was also on the Commission when it decided the instant matter and she did not dissent from the Commission order here. The logical inference to be drawn from her not dissenting here is that she saw the instant matter as distinguishable from the circumstances in RCN Telecom Services. Indeed, the Commission order here notes that it denied RCN Telecom Services' motion to consolidate because "the particular facts of each proceeding are sufficiently unique as to render consolidation inappropriate." DirecTV & Comcast, 15 F.C.C.R. at 22803 n.4 (JA 554). The facts of this case are different from those in RCN Telecom Services. For example, here the facts demonstrate that SportsNet is a new programming service. In RCN Telcom Services, neither the Bureau nor the Commission had determined that the "overflow" programming service at issue there was a new service. RCN Telecom Services, 16 F.C.C.R. 12048.

EchoStar's reliance (Br. 38 n.37) upon the Commission's decision to request discovery in Turner Vision, Inc. v. Cable News Network, 13 F.C.C.R. 12610 (1998), is similarly misplaced. Turner Vision was a price discrimination case which calls for very specific information about the various factors programmers consider before arriving at rates for carriage. The Commission

[4] Comcast's Motion to Compel also discusses the 1997 Vanity Fair article about Comcast's Chief Executive Officer. That article was in EchoStar's Complaint and thus was new. EchoStar's Complaint at p. 10 (JA 338). For the reasons discussed, supra, at pp. 20-23, it did not warrant discovery and would not have changed the Commission's decision.

found that Cable News Network had failed to provide the specific data necessary for such an inquiry. Id. at 12612. Here, unlike in Turner Vision, Comcast provided specific data about why terrestrial delivery was more cost effective than delivery via satellite. Comcast provided that evidence through an affidavit that complies with 47 C.F.R. 76.6(a)(3) of the Commission's rules. EchoStar, a satellite provider who should be able to marshal relevant evidence about the cost difference between terrestrial and satellite delivery, made no attempt at trying to show why that cost estimate was inaccurate. Consequently, the Bureau was correct in concluding that EchoStar did not present a factual dispute that required further discovery.

III. THE COMMISSION CORRECTLY REJECTED ECHOSTAR'S ARGUMENT THAT THE ONLY INQUIRY REQUIRED UNDER SECTION 628(b) IS WHETHER A DEFENDANT'S CONDUCT HAD THE EFFECT OF PREVENTING A MULTI-CHANNEL VIDEO PROGRAMMING DISTRIBUTOR FROM RECEIVING A TERRESTRIALLY DELIVERED PROGRAM

A. Standard of Review

"For challenges to an agency's construction of the statutes or regulations that it administers * * * the Court's review must be particularly deferential." Davis v. Latschar, 202 F.3d 359, 365 (D.C. Cir. 2000). In determining whether the Commission has properly interpreted a statute, the Court reviews the agency's decision in accordance with Chevron USA Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). Under Chevron, the Court "employs traditional tools of statutory construction" to determine "whether Congress has directly spoken to the precise question at issue." Id. at 843 n.9. If so, "the court as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-843.

Where "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the

statute." 467 U.S. at 843. Under those circumstances, the Court defers to the agency's interpretation if it is reasonable. United States v. Mead Corp., 121 S. Ct. 2164, 2171 (2001); Global Crossing Telecommunications, Inc. v. FCC, 259 F.3d 740, 744 (D.C. Cir. 2001).

For the reasons we explain, infra, in Section 628 (b) of the 1992 Cable Television Consumer Protection and Competition Act, Congress directly spoke to the question of statutory interpretation EchoStar raises and answered it against EchoStar's position. Should this Court determine, however, that the statute is not clear on the issue, this Court should defer to the Commission's interpretation.

B. EchoStar's Interpretation of Section 628(b) Improperly Reads The Unfair Or Deceptive Test Out Of The Statute.

It is an established canon of statutory construction that courts must give meaning and effect to each term of a statute. See, e.g., Carter v. United States, 530 U.S. 255, 262 (2000); Walters v. Metropolitan Educational Enterprises, 519 U.S. 202, 208-209 (1997).

Section 628 (b) of the 1992 Cable Television Act states that:

> [i]t shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

Before the Bureau and the Commission, EchoStar argued that the plain language of Section 628(b) required the Commission to find that Comcast violated its provisions because the purpose or effect of Comcast's actions was to hinder significantly or prevent EchoStar from providing SportsNet to its subscribers. See 15 F.C.C.R. at 22805 (Commission Order) (JA 556); 14 F.C.C.R. at 2095, 2102 (Bureau Order) (JA 486, 493). In its opening brief EchoStar further

contends that Section 628(b) "applies so long as a competing distributor is hampered in the provision of 'satellite cable programming,' no matter if the programming withheld from that competitor qualifies itself as 'satellite cable programming.'" EchoStar Br. 53. To accept EchoStar's interpretation, would improperly read the "unfair or deceptive" test right out of the statute. This Court should decline that invitation.

Furthermore, EchoStar's argument suggests that Congress intended to outlaw all legitimate business decisions that significantly hampered satellite providers. Nothing in the statute supports such a broad interpretation. Indeed, Section 601(6) of the Act states that the "purposes of this title are to *** promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems." 47 U.S.C. 521(6).

EchoStar further asserts that it appears that the Commission's analysis of its Section 628(b) claim did not venture beyond the pleadings and, hence, the Commission legally held that Section 628(b) cannot apply to terrestrially delivered programming. EchoStar Br. 51. EchoStar is wrong. It is quite evident from the Commission and Bureau's analysis of the facts that they went beyond the pleadings and rejected EchoStar's 628(b) claim because it did not prove that Comcast's actions were unfair or deceptive. 15 F.C.C.R. at 22808 (Commission Order) (JA 559). The Commission was open to the possibility that Comcast violated Section 628(b) by moving an existing service from satellite to terrestrial delivery. It found, however, that the SportsNet service, which Comcast delivered terrestrially, was not the same SportsChannel Philadelphia service that had previously been delivered by satellite. As previously argued, the record provides substantial support for the finding that SportsNet is a new service. The Commission also considered whether legitimate business reasons, in the form of substantial cost

savings supported a decision to use terrestrial delivery for this new service. Again, as previously argued, the record provides substantial support for the findings that there are such savings.

CONCLUSION

For the foregoing reasons, the Court should deny EchoStar's petition for review and affirm the Commission's decision.

Respectfully submitted,

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October 18, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ECHOSTAR COMMUNICATIONS CORPORATION, PETITIONER, V. FEDERAL COMMUNICATIONS COMMISSION, RESPONDENT.	)	No. 01-1032

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Federal Communications Commission" in the captioned case contains 8672 words.

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